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5  
6 **UNITED STATES BANKRUPTCY COURT**  
7 **DISTRICT OF ARIZONA**

8 In re:  
9 POTENTIAL DYNAMIX, LLC,  
10 Debtor.

CHAPTER 11

Case No. 2:11-bk-28944-DPC

**OBJECTION TO AMENDED  
APPLICATION OF GALLAGHER &  
KENNEDY FOR PAYMENT OF FEES  
AND REIMBURSEMENT OF COSTS**

**(Evidentiary Hearing Requested)**

13  
14 Five minutes before the hearing to consider G&K's<sup>1</sup> First Interim Fee Application  
15 ("Original Application") [DE 673], G&K filed an amended application ("Amended  
16 Application") [DE 713]. The Amended Application has text that is just one page in length  
17 and purports that it was filed to "clarify" the Original Application and attached a "settlement  
18 agreement" with the Receiver. Instead of clarifying things, the Amended Application  
19 exacerbates the confusion over the amount and legal and factual bases for the fees being  
20 sought. As the Court directed, Jess and Goldberg reached out to G&K for clarification  
21 before filing this objection, but none was provided. As such, Jess and Goldberg cannot  
22 determine if G&K is asking this Court to approve \$1.1 million in fees and costs, a  
23 contingency of 40% of a future recovery, or some other amount.

24 To the extent G&K is now asking the Court to approve \$1.1 million in fees and costs,

25  
26 <sup>1</sup> Capitalized terms used herein shall have the same meanings ascribed to them in Jess and  
Goldberg's Preliminary Objection to Interim Fee Application of Gallagher & Kennedy [DE 692].

1 or some lesser amount to be paid from the Receivership Action, Jess and Goldberg's  
2 original objections are relevant and incorporated herein. In addition to the lack of clarity  
3 and the incorporation of all prior arguments, the Court should not consider the Amended  
4 Application for three threshold reasons. First, whether G&K was properly employed has  
5 not been determined and is subject to bona fide dispute and a pending request for evidentiary  
6 hearing. Second, G&K is only entitled to an award of fees upon a recovery, and no recovery  
7 has occurred. G&K allegedly has the rights that SW had, and SW was only entitled to an  
8 award of fees upon a recovery. Third, because there is no recovery yet, any adjudication of  
9 the contested issues surrounding the Amended Application, both under state law and  
10 bankruptcy law, will result in an advisory opinion and an unnecessary use of judicial  
11 resources.

12 **I. THE AMENDED APPLICATION IS UNCLEAR**

13 As noted above, the Amended Application is unclear as to the relief it is seeking.  
14 The operative language in the Amended Application is on page 2 and is as follows:

15 [T]o clarify the Application, G&K is only seeking payment of  
16 the firm's attorneys' fees *[not defined]* and reimbursement of  
17 its costs (in the amount of \$297,392.54) from the Estate, out of  
18 any recovery, pursuant to [1] the Contract for Legal Services  
dated June 17, 2019, and [2] orders approving the employment  
of counsel in these proceedings. (brackets and emphasis added)

19 The "Contract for Legal Services dated June 17, 2019" is the contingency fee  
20 agreement between the Trustee and SW for 40% of any recovery. At the present time, if  
21 the existing Judgment were paid in full, 40% of the Judgment would be about \$520,000.  
22 So a recovery premised on the "Contract for Legal Services" would be about \$520,000. On  
23 the other hand, the "orders approving employment of counsel" do not rely on the  
24 contingency fee agreement and instead incorporate the "Agreement of Counsel" that  
25 purports to provide for payment of G&K's fees on an hourly basis. The Original  
26 Application indicated that G&K's fees on an hourly basis were over \$1.6 million. So

1 instead of clarifying that G&K is seeking recovery on a contingency basis, or is still seeking  
2 recovery on an hourly basis, the Amended Application simply conflates the two theories  
3 and apparently relies on both.

4 Moreover, the alleged settlement agreement attached to the Amended Application  
5 refers to “G&K Claims” as \$1.1 million to be paid \$650,000 from “Receivership Assets,”  
6 which is the proceeds from the Swift Litigation, and \$450,000 from “any funds received by  
7 G&K from the Amazon Litigation.” Settlement agreement ¶¶ 2, 3, 5. If G&K receives more  
8 than \$450,000 from the Amazon Litigation, that amount will be “timely remitted to  
9 reimburse the Receiver.” *Id.* ¶ 5. There is no basis or authority referenced in the Amended  
10 Application or the settlement agreement for this compromise deal.

11 Simply stated, there is no statement in the Amended Application or in the Settlement  
12 Agreement stating that G&K is seeking fees based on an hourly rate, on a contingency rate,  
13 or the amount of fees that G&K is asking this Court to approve. Instead, the Amended  
14 Application simply conflates all theories and asks for some type of an award or advisory  
15 opinion.

16 At the Court’s suggestion during the last hearing, Jess and Goldberg expressly asked  
17 G&K to clarify. After placing the issue in context, G&K was asked as follows:

18 I would request two things: First, that you clarify (1) whether  
19 the Amended Interim Application seeks solely the approval of  
20 the 40% contingency fee and the costs incurred, and there is no  
21 request for approval of any fees based on an hourly basis, or  
22 (2) whether the Amended Interim Application is seeking  
23 approval of both contingency and hourly fees. Second, I would  
24 request that you consider whether the Amended Interim  
25 Application requires an amendment to the Order authorizing  
26 Employment so as to make clear that G&K was merely  
stepping into SW’s shoes for the 40% contingency or whether  
the Employment Order will continue to provide for payment of  
fees incurred on an hourly basis. If G&K is still going to ask  
the bankruptcy court to approve some or all of its fees in the  
Amazon litigation on an hourly basis as opposed to a  
contingency basis, I think that needs to be clearly spelled out.

I think this issue highlights a problem with the settlement as

1 currently structured. Even if it all works as intended, it results  
2 in a total of \$1.1 million going to G&K, which is at least \$290k  
3 more than G&K would currently get under the June 2019 SW  
4 contingency agreement. So the question is whether you are  
5 asking the bankruptcy court to approve this extra \$290k as  
6 reasonable knowing that it doesn't come from the debtor's  
7 estate (and ignoring the question of whether the bankruptcy  
8 court even has jurisdiction to approve fees not paid by the  
9 debtor's estate), or whether you are going to ask the State Court  
10 to award you fees for work done in a bankruptcy cases that  
11 have not been approved by the bankruptcy court, and may  
12 never be approved as reasonable by the bankruptcy court.<sup>2</sup>

13 G&K never responded to this email. G&K did not clarify whether the Amended  
14 Application seeks solely the 40% contingency fee recovery, or whether it was still seeking  
15 approval of fees on an hourly basis. G&K also did not clarify whether the Amended  
16 Application would require a modification of the Order approving the Employment  
17 Application that was premised on the Agreement of Counsel.

18 Specifically, it is unclear whether the Amended Application seeks a fee award of:  
19 (a) \$290,000 (the difference between \$1.1 million and G&K's costs plus a contingency fee  
20 of \$520,000); (b) \$450,000 (the amount G&K is seeking from the Amazon Litigation under  
21 the settlement); (c) a contingency fee of 40% of any ultimate recovery (likely about \$520,000  
22 if the current judgment were enforced and paid); (d) \$820,000 (a contingency fee of 40%,  
23 likely about \$520,000, and \$300,000 in costs); or (e) or \$1.1 million. If the Amended  
24 Application asks the Court to award fees and costs of \$1.1 million with \$650,000 to be paid  
25 using the Swift Proceeds, then the Amended Application fails to cite to any legal authority  
26 that gives the Court the jurisdiction or the statutory authority to award fees not payable by  
the bankruptcy estate. Nor is there a basis to determine how G&K concluded or calculated  
that the estate's fee and cost obligation to G&K is \$1.1 million, \$820,000, \$450,000,  
\$290,000, or some other number.

## 27 II. AUTHORITY FOR AWARD OF FEES

28 <sup>2</sup> A copy of the email sent on October 31, 2022 (with a reference to settlement discussions redacted)  
is attached as **Exhibit A**.

1 The Amended Application does not refer to any specific provision of any  
2 employment agreement or court order that supports a fee payment in the amount of \$1.1  
3 million, \$820,000, \$450,000, or \$290,000. In fact, the Amended Application does not  
4 establish that there is an employment agreement that the Trustee has approved. The Court,  
5 however, is aware that Mr. Dooley did not consent to the Agreement of Counsel:

6 I'm not going to intertwine these cases, I'm not going to agree  
7 to do stuff that helps [G&K] and hurts the estate. I'm - that's  
8 stupid. Beyond business stupid it's probably a fiduciary breach  
finding.<sup>3</sup>

9 I told [Dale Schian] there was no way I was doing that. Only  
10 to find out later that he'd done it unilaterally behind my back.<sup>4</sup>

11 And to make matters worse, I specifically disavowed this  
12 provision .... I said I'm not doing that. So [it] looks to me like  
13 this is an end run around my direction ... to my attorney.<sup>5</sup>

14 Dale violated [my] direction and intertwined the two cases  
15 against [my] specific instructions ... while he was my counsel.<sup>6</sup>

### 16 **III. THE AGREEMENT OF COUNSEL**

17 Significantly, it is not clear whether G&K continues to rely on the Agreement of  
18 Counsel as a basis for its amended fee request. This is a very important issue. As the Court  
19 is aware, G&K has apparently used the Agreement of Counsel to leverage a settlement with  
20 the Receiver that would take real and substantial money away from creditors of SW,  
21 including Jess and Goldberg. Without any court yet considering the issue, the settlement  
22 relegates and subordinates all creditors, including Jess and Goldberg, behind the payment  
23 to G&K. As such, the settlement provides that if the State Court does not ratify the  
24 settlement, it is null and void. Settlement agreement ¶ 4. Therefore, this entire exercise  
may prove futile. Accordingly, G&K needs to clarify if the Amended Application continues  
to rely on the Agreement of Counsel. To the extent that G&K continues to rely on the

25 <sup>3</sup> Dooley Depo. [DE 685] at 54:21-15.

26 <sup>4</sup> *Id.* at [DE 685] at 141:17-19.

<sup>5</sup> *Id.* [DE 685] at 116:14-19.

<sup>6</sup> *Id.* [DE 685] at 169:15-20.

1 Agreement of Counsel, Jess and Goldberg have already, and once again request an  
2 evidentiary hearing concerning the misrepresentations and non-disclosures by G&K.

3 **IV. INCORPORATION OF ARGUMENTS FROM JESS AND GOLDBERG'S**  
4 **ORIGINAL OBJECTION**

5 In this Objection to the Amended Application, Jess and Goldberg incorporate their  
6 (a) Limited Objection to G&K's employment [DE 693] and (b) preliminary objection to the  
7 Original Application [DE 692] (collectively, the "Prior Objections"). The Prior Objections  
8 apply to the Amended Application without distinction.

9 The Amended Application should be denied because G&K does not have a binding  
10 employment contract for the reasons detailed in the Prior Objections, which are summarized  
11 below for the Court's convenience.

12 1. **Schian Lacked Authority to Bind SW to the Agreement of Counsel.**

13 Jess and Goldberg were majority owners of the SW. Schian's managerial rights were  
14 limited to day-to-day matters. Schian agreed to the dissolution of SW. The Receiver found  
15 that Schian required Jess and Goldberg's consent to bind SW to the Agreement of Counsel.  
16 If Schian lacked authority, which he did, then the Court approved a non-binding  
17 employment agreement. If the agreement is not binding, then G&K will be required to seek  
18 compensation under an alternative theory.

19 2. **The Cross Collateral Provision Resulted in a Fraudulent Transfer Made**  
20 **With the Intent to Delay and Defraud Creditors.**

21 The Cross Collateral Provision resulted in a transfer of SW's interests in the Swift  
22 Proceeds to G&K and Schian. The transfer was made by an insider (Schian) who retained  
23 control after the transfer was made. The transfer was made for no value, while SW was  
24 going out of business and to avoid paying debts it owed to third parties, such as Jess and  
25 Goldberg. The transfer was not disclosed to Jess, Goldberg, Dooley, or Shaffer or to the  
26 Receiver, and the transfer was a transfer of SW's only valuable asset. Substantially all of  
the badges of an intentionally fraudulent transfer are present. *See* A.R.S. § 44-1004(B).

1  
2 3. **The Cross Collateral Provision Resulted in a Constructively Fraudulent**  
3 **Transfer.**

4 The Cross Collateral Provision resulted in a transfer of the SW's interests in the Swift  
5 Proceeds for less than reasonably equivalent value when SW could not pay its debts in the  
6 ordinary course of business. The foregoing is not subject to a bona fide dispute. *See* A.R.S.  
7 § 44-1004(B).

8 4. **The Cross Collateral Provision Evidences a Breach of Fiduciary Duty by**  
9 **Schian When He Was a Shareholder and Partner at G&K.**

10 Schian owed fiduciary duties to members of SW as its managing Member. Schian  
11 owed fiduciary duties to creditors of SW because SW was insolvent when the transfer was  
12 made and Jess and Goldberg were creditors. *See Cal X-Tra v. W.V.S.V. Holdings, LLC*, 229  
13 Ariz. 377 (2012).

14 5. **G&K's Billing of Fees Violated the Receivership Orders.**

15 The Order appointing the Receiver prohibited third parties from incurring debts that  
16 the Receivership would become obligated to pay. G&K incurred a large debt while the  
17 Receivership was pending without the Receiver's knowledge and consent or the State Court.  
18 Substantially all the fees G&K incurred were incurred **after** the Receiver was appointed.

19 6. **The Lack of Client Consent to the Cross Collateral Provision Invalidates**  
20 **It.**

21 Dooley and Shaffer had the right to approve the Cross Collateral Provision and the  
22 payment of G&K's fees from secondary sources. G&K obtained employment and seeks  
23 compensation on employment terms that its clients did not agree to.

24 7. **Under the Agreement of Counsel G&K Only Had the Fee Payment**  
25 **Rights That Schian Walker Had.**

26 SW waived its fees rights in its contingency fee agreement dated June 2019. The  
waiver was effective if SW could not complete its representation, which event occurred in  
July 2019. Accordingly, G&K has no contractual right to seek fees because SW lacked

1 those same rights.

2 The agreement between the Receiver and G&K does not resolve the above state law  
3 issues because they have been asserted not by SW or by the Receiver but by Jess and  
4 Goldberg as creditors and members of SW. Regardless, the issues described above were  
5 not disclosed to the Court in connection with the Employment Application as was required.  
6 But even if the Court chooses to consider the Amended Application, it should be denied  
7 under applicable bankruptcy law because of the reasons detailed in the Prior Objections.  
8 These are summarized below for the Court's convenience:

9 1. **Lack of Bankruptcy Jurisdiction.**

10 The Bankruptcy Court does not have jurisdiction to award fees not payable from the  
11 bankruptcy estate. If the Amended Application seeks an award of \$1.1 million or any award  
12 payable out of the Swift Proceeds, then such a request is not within the Court's jurisdiction  
13 to approve.

14 2. **Lack of Statutory Authority.**

15 Bankruptcy Code § 330 provides that the Court may "award" fees but only from  
16 property of the estate, and the Swift Proceeds are not property of the estate.

17 3. **Lack of Disclosure and Misleading Representations.**

18 G&K did not disclose the conflict-of-interest Schian had. G&K misrepresented that  
19 Jess and Goldberg had left SW and that Goldberg refused to work on the Amazon Litigation.  
20 No disclosure was made that SW was insolvent and that claims had been asserted that  
21 Schian lacked authority to bind SW to the Agreement of Counsel.

22 4. **Lack of Notice and Due Process.**

23 The Cross Collateral Provision is not disclosed in the Employment Application and  
24 not clearly described in the Agreement of Counsel. Notice was not given to Jess and  
25 Goldberg. The extraordinary relief of the Cross Collateral Provision required notice and a  
26 hearing.



1  
2           5.     **The Requested Fees are Unreasonable.**

3           SW had performed most of the pre-trial work. The trial was limited to opposing  
4 experts. Consideration of documents was limited to May 15th data. There was a single  
5 breach of contract claim to be decided.

6           6.     **The Requested Fees Did Not Benefit the Estate.**

7           In the Amended Application, G&K *appears* to be seeking a fee award of \$1.1  
8 million, while the bankruptcy estate may receive about \$100,000, so that the fees G&K is  
9 seeking are about ten times greater than the amount of cash the estate will receive, while no  
10 distribution will be made to unsecured creditors and administrative creditors will receive  
11 token payments.

12           Jess and Goldberg anticipate that G&K will contend that they lack standing to object  
13 to the Amended Application. Jess and Goldberg have standing because the Amended  
14 Application is tied to the agreement between G&K and the Receiver which effects the rights  
15 of Jess and Goldberg in the State Court. In other words, approval of the Amended  
16 Application will result in the distribution of the Swift Proceeds to G&K that Jess and  
17 Goldberg contend should be paid to them. Their financial stake in the matter is obvious.

18   **V. CONCLUSION**

19           The Court should deny the Amended Application. It is unclear as to the relief it is  
20 seeking. Open issues remain as to the legality of G&K's employment, the Court's approval  
21 of the Agreement of Counsel, and any ruling on the Amended Application would be  
22 advisory and/or a waste of judicial resources given that there is not yet any approval from  
23 the State Court (a predicate requirement) and that no recovery from Amazon has been  
24 obtained. Indeed, there are many unresolved issues concerning the enforceability of the  
25 Agreement of Counsel and any fee application. Finally, G&K has not shown that the Court  
26 has the jurisdiction and/or the statutory authority to approve the Amended Application, and

1 has not shown that the fees requested are reasonable and benefitted the estate.

2 DATED this 14th day of November, 2022.

3 MOYES SELLERS & HENDRICKS

4  
5 By /s/ Keith L. Hendricks, #012750  
6 Keith L. Hendricks  
7 Attorneys for Cody J. Jess and Scott  
Goldberg

8 **CERTIFICATE OF SERVICE**

9 I hereby certify that on November 14, 2022, I electronically transmitted the attached  
10 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
11 Notice of Electronic Filing, receipt of which constitutes service under L.R. Bankr. P. 9076-  
12 1(a), to all parties who have appeared or otherwise filed request for notice in this matter.

13 I further certify that on November 14, 2022, I electronically transmitted the attached  
14 document to the following parties who have not appeared in this matter:

15 Mark Deatherage, Esq.  
16 Mark Deatherage Law Office  
17 516 W. Royal Palm Rd.  
18 Phoenix, AZ 85021  
19 [mark@deatheragelawaz.com](mailto:mark@deatheragelawaz.com)

20 Robert Miller, Esq.  
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23 16435 N. Scottsdale Rd., #440  
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25 [rmiller@buchalter.com](mailto:rmiller@buchalter.com)  
26 [ktarazi@buchalter.com](mailto:ktarazi@buchalter.com)

/s/ Julie Larsen

# EXHIBIT A

## Keith Hendricks

---

**From:** Keith Hendricks  
**Sent:** Monday, October 31, 2022 2:07 PM  
**To:** Ross, Michael R.; Schian, Dale C.  
**Cc:** mark@deatheragelawaz.com; Cody Jess; Scott Goldberg; Ryan Anderson  
**Subject:** G&K Amended Interim Application

Gentlemen,

there is one issue that I previewed before Judge Collins where he invited me to reach out to confirm what is intended. I am doing just that. The issue is the underlying agreements that authorize the fee application and what exactly that you are requesting. It is our position that your Amended Interim Application continues to conflate (or at least potentially conflate) two irreconcilable underlying agreements. That is the 40% SW contingency agreement, and the Agreement of Counsel that provides for the payment of fees on an hourly basis to be paid from the Swift proceeds. On page 2 of the Amended Interim Application, G&K states:

“Second, to clarify the Application, G&K is only seeking payment of the firm’s attorneys’ fees and reimbursement of its costs (in the amount of \$297,392.54) from the Estate, out of any recovery, pursuant to [1] the Contract for Legal Services dated June 17, 2019 [the 40% SW contingency agreement], and [2] orders approving the employment of counsel in these proceedings.” (emphasis and brackets added).

So, as I read this, it says that G&K is seeking payment of fees and costs from the Amazon debtor’s estate out of the 40% contingency contract (which is approximately \$520k in fees as the judgment is currently constituted and \$300k in costs), and recovery from the Estate under the Employment Orders. But G&K previously argued that the Employment Order approves the Agreement of Counsel, which provides for payment from SW on an hourly basis. So I don’t know if the Amended Interim Application is asking the Court to approve as reasonable both a 40% contingency and a certain amount of hourly work on top of that. I understand that the settlement agreement compromises, modifies and reduces claims under the Agreement of Counsel, but because it ultimately provides for G&K to get \$1.1 million if everything works as intended, which is more than just the contingency and costs, it is still premised on the Agreement of Counsel. Moreover, the Agreement of Counsel was the basis for the Employment Order and the Settlement Agreement cannot unilaterally modify the Employment Order.

I would request two things: First, that you clarify (1) whether the Amended Interim Application seeks solely the approval of the 40% contingency fee and the costs incurred, and there is no request for approval of any fees based on an hourly basis, or (2) whether the Amended Interim Application is seeking approval of both contingency and hourly fees. Second, I would request that you consider whether the Amended Interim Application requires an amendment to the Order authorizing Employment so as to make clear that G&K was merely stepping into SW’s shoes for the 40% contingency or whether the Employment Order will continue to provide for payment of fees incurred on an hourly basis. If G&K is still going to ask the bankruptcy court to approve some or all of its fees in the Amazon litigation on an hourly basis as opposed to a contingency basis, I think that needs to be clearly spelled out.

I think this issue highlights a problem with the settlement as currently structured. Even if it all works as intended, it results in a total of \$1.1 million going to G&K, which is at least \$290k more than G&K would currently get under the June 2019 SW contingency agreement. So the question is whether you are asking the bankruptcy court to approve this extra \$290k as reasonable knowing that it doesn’t come from the debtor’s estate (and ignoring the question of whether the bankruptcy court even has jurisdiction to approve fees not paid by the debtor’s estate), or whether you are going to ask the State Court to award you fees for work done in a bankruptcy cases that have not been approved by the bankruptcy court, and may never be approved as reasonable by the bankruptcy court.

Keith



**Keith L. Hendricks**  
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